

REMARKS

Status of the claims

Claims 1-10 are pending in the application with claim 4 being amended herein for clarity. The amendments to claim 4 in no way change the scope of the claims. As such, entry and consideration thereof are respectfully requested.

Rejection under 35 U.S.C. §112, 2nd paragraph

Claim 4 has been rejected under 35 U.S.C. §112, 2nd paragraph, as lacking antecedent basis for the feature “the former being positioned outside and the latter being positioned inside.” Claim 4 has been amended to recite, “wherein the fermented soybeans are the former being positioned outside and the latter being fermented brown rice is positioned inside.” As such, proper antecedent basis is provided for all terms and withdrawal of the rejection is respectfully requested.

Rejections under 35 U.S.C. §103

a) Claims 1 and 5 have been newly rejected under 35 U.S.C. §103 as being obvious over Tewari, J. Food Sci. Tech., (2002), Vol. 39 p. 458-462 (“R1”). Reference R1 is asserted to teach the preparation of tempeh from germinated chickpeas using *R. oligosporus*. The Examiner asserts that it would be obvious to one skilled in the art to also germinate brown rice and make the tempeh using the germinated brown rice to improve the nutritional quality. The Examiner also notes that malting using germinated barley grains is known in the brewing art. Applicants traverse this rejection and withdrawal thereof is respectfully requested.

Applicants note initially that the Examiner has not supported the assertion that it is known in the brewing arts to use germinated barley grains with malting. Thus, the Examiner appears to have taken official notice with regard to this assertion. However, in accordance with MPEP §2114.03,

Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known.... It would not be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known. For example, assertions of technical facts in the areas of esoteric technology or

specific knowledge of the prior art must always be supported by citation to some reference work recognized as standard in the pertinent art.

The use of germinated barley grains with malting is specific knowledge of the prior art. As such, the Examiner is requested to support this assertion with evidence.

In addition, even if the references are considered the instant invention remains unobvious. There must be some reasonable basis or rationale for why one skilled in the art would look to a reference for a suggestion of the claimed invention. See e.g. MPEP §§2141 and 2144. The R1 reference is specifically directed to addressing the problem of digestibility of chickpea pulses and tempeh made from chickpeas, which results from the high concentration of flatulence factors in chickpeas. See, e.g. page 458, left column second paragraph and right column, first full paragraph. However, as evidenced by the attached documents (medicinenet.com "Intestinal Gas (Belching, Bloating, Flatulence)"; Wikipedia.com "Flatulence"; and About.com "Alternative Medicine Natural Treatments for Gas, Flatulence and Bloating"); this problem simply does not exist with rice. Indeed, MedicineNet.com states,

Rice is the most easily digested starch and little undigested rice starch reaches the colon and the colonic bacteria. Accordingly, the consumption of rice produces little gas.

Wikipedia.com similarly states, "Rice is the only starch that does not cause gas". R1 teaches very specifically that the nutritional quality of the chickpeas tempeh is improved because of the reduced flatulence factors. However, this problem does not exist with rice, as seen from the evidence presented herein. As such, there is absolutely no reason why one skilled in the art would be led to germinate rice based on the teachings of R1. In other words, there would be no reasonable expectation of success of improving the nutritional value of rice tempeh by germinating the rice, since the improvement seen in R1 occurs through the solution of a problem that does not exist with rice. The Examiner has therefore failed to provide any credible or reasonable rationale for why one skilled in the art would look to R1. The instant invention is therefore not obvious over the reference teachings and withdrawal of the rejection is respectfully requested.

b) Claims 2-4 and 6-10 have been rejected as being obvious over Hesseltine et al. US 3,243,301 ("R2") combined with R1. The R2 reference is relied upon for teaching a step of pre-cracking and hydrating cereal grains, including rice, prior to fermentation in the preparation of

tempeh. R2 is further relied upon for teaching tempehs made from a mix of rice and soybeans. The Examiner asserts that it would have been obvious to one skilled in the art to use sprouted brown rice in the tempeh of R2, rather than cracked rice because of improved nutritional value. Applicants traverse this rejection and withdrawal thereof is respectfully requested.


As discussed above, R1 specifically teaches the improvement of the nutritional value of chickpea tempeh through the reduction of flatulence factors. However, since flatulence is not a problem with rice, this "solution" would not have no application with rice. As such, there is absolutely no reason why one skilled in the art would be lead to germinate rice based on the teachings of R1. In other words, there would be no reasonable expectation of success of improving the nutritional value of rice tempeh by germinating the rice, since the improvement seen in R1 occurs through the solution of a problem that does not exist with rice. The Examiner has therefore failed to provide any credible or reasonable basis for why one skilled in the art would look to R1 to modify the teachings of R2. The present invention is therefore similarly not obvious over the combined teachings of R2 and R1 and withdrawal of the rejection is respectfully requested.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact MaryAnne Armstrong, PhD, Registration No. 40069 at the telephone number of the undersigned below to conduct an interview in an effort to expedite prosecution in connection with the present application.

If necessary, the Director is hereby authorized in this, concurrent, and future replies to charge any fees required during the pendency of the above-identified application or credit any overpayment to Deposit Account No. 02-2448.

Dated: December 16, 2010

Respectfully submitted,

By 
MaryAnne Armstrong, PhD
Registration No.: 40069
BIRCH, STEWART, KOLASCH & BIRCH, LLP
8110 Gatehouse Road, Suite 100 East
P.O. Box 747
Falls Church, VA 22040-0747
703-205-8000

Attachment(s): medicinenet.com ("Intestinal Gas (Belching, Bloating, Flatulence");
Wikipedia.com ("Flatulence"); and
About.com ("Alternative Medicine Natural Treatments for Gas, Flatulence and
Bloating")